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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 827

UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioner,

vs.

NANCY WINKLER, a minor by her Mother and Guardian Ad Litem VIOLET M. WINKLER, JOYCE ANN SIMPSON and MARGARET LOUISE PATTON LOHSE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States Fidelity and Guaranty Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on October 27, 1965.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Western District of Missouri, Western Division, is unreported but this memorandum opinion appears at page 158, *et seq.* of the Record. The opinion of the Circuit Court of Appeals (Appendix page A1 *et seq.*) is reported in 351 F.2d 685.

Petitioner presents herewith a certified copy of the Record below, including Proceedings in the United States Court of Appeals for the Eighth Circuit appended thereto. Petitioner also submits herewith nine uncertified copies of the Record below. Respondents have been previously served with copies of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 27, 1965 (Appendix page A1) (References herein to "Appendix" are to the "Proceedings in the United States Court of Appeals for the Eighth Circuit" as they appear in a supplement affixed to the original Record in the United States Court of Appeals for the Eighth Circuit by the clerk thereof and attached to this petition as an appendix. References herein to "Record" or "R." are to the Record in the United States Court of Appeals.) A petition for rehearing filed November 10, 1965 (Appendix page A12), was denied on November 15, 1965 (Appendix page A15). A stay of mandate pending a petition to the Supreme Court for a writ of certiorari was ordered for a period of thirty days on November 23, 1965 (Appendix page A16). The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether, under Missouri law, the coverage of an automobile liability policy extended to protect the wife of the named insured (who was the title owner of the automobile) in the policy after the parties were divorced and after the title to the automobile was assigned to the wife.

STATEMENT

This action arose when petitioner United States Fidelity and Guaranty Company filed a petition for declaratory judgment in the United States District Court for the Western District of Missouri, Western Division (R. 1 *et seq.*). In it the petitioner alleged that it had issued an automobile liability insurance policy (the policy is set out at page 179 of the Record) to one D. H. Patton covering a 1955 Buick automobile, owned by said D. H. Patton, which said policy was in full force and effect on October 23, 1959, on which date respondent Margaret Louise Patton Lohse (hereinafter referred to as respondent Patton) wife of D. H. Patton, was granted a divorce from him and the certificate of title to the said automobile was duly signed and delivered to respondent Patton; that thereafter while respondent Patton was operating said automobile she was involved in an accident wherein respondents Nancy Winkler and Joyce Ann Simpson were allegedly injured; that petitioner denied coverage to said Margaret Louise Patton because she was the legal owner of the automobile, was not a member of a household of the named insured, D. H. Patton and was not driving the automobile with the consent of the named insured, D. H. Patton, because he did not own the same; that respondents Winkler and Simpson thereafter filed

lawsuits against respondent Patton, recovered judgments against her in the amount of $15,000.00 and $10,000.00 respectively and were threatening respondent with garnishment proceedings, claiming benefits under the policy of insurance and respondent prayed an order of court declaring no liability under said insurance policy. All defendants filed separate answers (R. 5-7, 7-8, 9-10) to respondent's petition and a joint counter claim (R. 10) praying that the court enter judgment against respondent for the amount of the judgments recovered by respondents Winkler and Simpson against respondent Patton, to which respondent filed a reply in the nature of a general denial (R. 13). The basis of the jurisdiction of the United States District Court for the Western District of Missouri was that the parties were citizens of different states, petitioner being a citizen of Maryland and respondents being citizens of Missouri (R. 1-2) and the matter in controversy exceeded $10,000.00, respondent Winkler having recovered a judgment of $15,000.00 and respondent Simpson having recovered a judgment of $10,000.00 (R. 2) and both respondents were threatening petitioner with garnishment proceedings (R. 4). 28 U.S.C. § 1332.

After a trial to the court, the District Court entered its memorandum opinion, findings of fact and conclusions of law (R. 158 *et seq.*) finding coverage under the policy for respondent Patton and entered judgment (R. 170-171) for respondents Winkler and Simpson against petitioner based on the judgments they had previously obtained.

The testimony disclosed that Margaret Louise Patton and D. H. Patton were married in 1948 and lived together until they were separated in February, 1959 (R. 18). During this time the automobile in question was purchased by the Pattons (R. 19) and was thereafter driven largely by Mrs. Patton (R. 20, 89). Mrs. Patton who

formerly worked for petitioner made arrangements for insurance on the automobile (R. 20) and the insurance was renewed thereafter up to and including the time of divorce (R. 22).

On October 23, 1959, the Pattons appeared in the Jackson County Circuit Court House where a divorce was granted to Mrs. Patton (R. 24, 85). Thereafter, the title to the automobile was signed, notarized and delivered to Margaret Louise Patton (R. 24, 85) and the automobile was delivered to her (R. 27, 86). Thereafter, at approximately 10:10 p.m. Margaret Louise Patton was involved in the accident (R. 15) as a result of which respondents Nancy Winkler and Joyce Ann Simpson filed actions against her and recovered the judgments mentioned hereinbefore (R. 17, Exhibit 5, R. 189 *et seq.* and Exhibit 6, 195 *et seq.*).

On appeal the judgment of the District Court was affirmed (Appendix page A11).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Trial Court reached a permissible conclusion upon the basis of Missouri law in holding that respondent by its policy provisions and actions intended that both Mr. and Mrs. Patton be named insured (Appendix page A8).

2. In holding that respondent Mrs. Patton was driving the automobile with the permission of Mr. Patton (Appendix page A9).

3. In affirming the order of the District Court (Appendix page A11).

REASONS FOR GRANTING THE WRIT

The Court of Appeals opinion has misinterpreted and misconstrued Missouri law in holding (Appendix page A8) that the Trial Court reached a permissible conclusion in holding that Mrs. Patton was insured under this policy. In so holding the Court of Appeals quoted the basis of the Trial Court's decision as follows (Appendix pages A6-A8):

> "As there are no Missouri cases setting forth the law on these facts, the Court is left to its judgment as to what the Missouri Court would hold in this situation. However, the Court does note the propensity of Missouri Courts to find coverage under an omnibus clause where that was the intention of the parties, Haynes vs. Linder, 323 S.W. 2d 505, l.c. 509 (K.C.Mo. App. 1959).
>
> "In regard to the defendants' contention that title had not passed to Mrs. Patton, this seems to have been refuted by Mr. Patton. In his testimony he stated that he intended to pass the Buick completely to Mrs. Patton on the afternoon of October 23, 1959, and since the title certificate had been properly endorsed and possession transferred to her, this was accomplished.
>
> "However, Missouri law regards ownership and insurable interest to be irrelevant when the insurance policy is one for liability as opposed to coverage such as fire or theft protection. As stated in Hall v. Weston, 323 S.W. 2d 673, l.c. 679 (Mo. 1959),
>
> '. . . wherein a policy of automobile liability insurance insures only against liability for damages by reason of bodily injury and property damage arising out of the ownership, maintenance, or *use* of the automobile, and for medical payments, and, further provides, as does the instant policy, that

"insured" includes the named insured and any person using the automobile with his permission. We hold in the described situation that proof that an automobile was owned by named insured or that he had an insurable interest therein is not necessary. Ownership under those circumstances is irrelevant on the question of Liability.'

"Further, the Court feels that because the plaintiff's agent Durkee was fully aware of the circumstances surrounding this policy and those insured under it, the plaintiff insured the risk of either Mr. or Mrs. Patton driving the car for so long as either party should be operating it or have it in his possession. And since the plaintiff company admits that it would have issued a binder or endorsement covering Mr. Patton under this same policy had it only been notified, it is in no way prejudiced by the continued coverage of this same person and the same car where the title has been transferred to her name after the divorce. As stated in Graften v. McGuire, 362 Mo. 882, 245 S.W. 2d 69, l.c. 71 (1952).

"'A contract or policy of insurance should be given a liberal construction so as to uphold it and accomplish the purpose or object for which it is made, rather than a strict, technical construction which may defeat such purpose or object. (citations) The insurance company had full knowledge of all the facts having a bearing on the risk insured before the policy was issued and it is now estopped to deny liability.'"

"While these cases differ on their facts, the Court feels that they indicate that the Missouri Court would hold that the risk the plaintiff insured was that of both Mr. and Mrs. Patton driving the Buick, and that a change in the title certificate from Mr. Patton to Mrs. Patton should not excuse the plaintiff from a liability it intended to assume when the policy was issued."

Pertinent portions of petitioner's policy are here set out. The insuring agreement of plaintiff's policy is found under Part I—Liability on the first page of the policy (Plaintiff's Exhibit 1, R. 179) and reads:

> "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of:
>
> A. bodily injury, sickness or disease, including death resulting therefrom, * * *"

Persons Insured are also set out in Part I of plaintiff's policy as follows:

> "The following are Insureds under Part I:
>
> (a) With respect to the owned automobile,
>
> (1) the Named Insured and any resident of the same household,
>
> (2) any other person using such automobile, provided the actual use thereof is with the permission of the Named Insured;
>
> (b) With respect to a non-owned automobile,
>
> (1) the Named Insured,
>
> (2) any relative, but only with respect to a private passenger automobile or trailer,
>
> provided the actual use thereof is with the permission of the owner;
>
> * * *"

Under Definitions under Part I is the following:

> " 'Named Insured' means the individual named in Item I of the declarations and also includes his spouse if a resident of the same household;
>
> 'Insured' means a person or organization described under 'Persons Insured';

'relative' means a relative of the Named Insured who is a resident of the same household;

'owned automobile' means a private passenger farm or utility automobile or trailer owned by the Named Insured, and includes a temporary substitute automobile;

* * *

'non-owned automobile' means an automobile or trailer not owned by or furnished for the regular use of either the Named Insured or any relative, other than a temporary substitute automobile;"

In the declarations of said policy occurs the following:

"Name of Insured & Address (No. & Street, Town, County, State)
D. H. Patton
3708 Flora
Kansas City, Missouri"

The Trial Court's opinion was based on the propensity of Missouri Courts to find coverage under an omnibus clause (R. 164) and cites the case of *Haynes* v. *Linder*, 323 S.W.2d 505, l.c. 509 (K.C. Mo. App. 1959).

In referring to the Haynes case it will be noted that a properly endorsed certificate of title had *not* passed from the owner of the vehicle to the purchaser. In that case the court held, l.c. 510:

"In order that one's use and operation of the automobile be 'with permission' within the meaning and effect of the omnibus clause, the relation of the assured to the automobile must be such that he is in a position to give consent. This is usually expressed by saying that the person purporting to give consent must have the capacity or power to give such consent. As a general rule this means the insured purporting to give consent must own the insured vehicle,

or in any event have such an interest in it such as the right to possession and control of it as to be in a position to give permission. 5A Am. Jur., Automobile Insurance, § 95, page 94; 45 C.J.S., Insurance, § 829c (2) bb, p. 900; Annotations, 72 A.L.R. 1390; 106 A.L.R. 1255; 126 A.L.R. 549.

"In Allstate Insurance Co. v. Hartford Accident & Indemnity Co., 311 S.W. 2d 41, 45, the Springfield Court of Appeals stated the rule thusly: 'The word "permission" as used in an omnibus clause has a flexible meaning depending upon the sense in which it is used. Under the definitions ordinarily given, it carries with it the necessary aspect of the right, power, or privilege to give or to withhold the grant of license embodied in the term. Thus one who has the right and power to use engages in such use by virtue of his own right and not by permission of another.'

"Thus, if a valid sale has occurred and possession of the automobile is delivered to the buyer, the subsequent use by the buyer is by virtue of the buyer's ownership of it and his right to control it and not by virtue of the grant to him of any permission by the seller, and does not constitute the use 'by permission' of the insured seller within the meaning of the omnibus clause provision. See, Virginia Auto. Mutual Ins. Co. v. Brillhart, 187 Va. 336, 46 S.E. 2d 377; Employers Liability Assur. Corp. v. Sweatt, 95 N.H. 31, 57 A.2d 157; 7 Appleman, Insurance Law and Practice, § 4358."

It will be noted that in arriving at this conclusion the Missouri Court adopted the General Rule in regard to permissive user set out in 5A Am. Jur., Automobile Insurance, Section 95, page 94 and 45 C.J.S., Insurance, Section 829 c(2) (b)bb, page 900. The citation referred to in 5A Am. Jur. is as follows:

"The word 'permission' or 'consent' connotes the power to grant or withhold it, and therefore in order

> for one's use and operation of an automobile to be within the meaning of an omnibus clause requiring the permission or consent of the named insured, the latter must, as a general rule, own the insured vehicle or have such an interest in it that he is entitled to possession and control of the vehicle and in a position to give such permission."

The citation in 45 C.J.S., Insurance, reads as follows:

> "Since, as stated supra subdivision c (2) (b) as of this section, the term 'permission' implies power to prevent, permission or consent, within an omnibus or extended coverage clause, cannot be given by one who is not the owner of the car, * * * or by one who is not a named insured, even though he is the owner or has obtained exclusive control and dominion over the car, as by purchase."

Thus it is noted that the Missouri Court adopts the rule that permission cannot be given by one who is not the owner of the car and that the owner of an automobile operates the same by virtue of his ownership. Such is the general rule as followed in *Nationwide Mutual Insurance Co.* v. *Cole,* (Supreme Court of Appeals, Va., 1962) 203 Va. 337, 124 S.E.2d 203; *Underwood* v. *National Grange Mutual Liability Company,* (Supreme Court of North Carolina, 1962) 258 N.C. 211, 128 S.E.2d 577; *American Fidelity Company* v. *Daniels,* (Supreme Court of Vermont, 1960) 163 A.2d 617; *Home Indemnity Company* v. *Bowers,* (Supreme Court of Tennessee, 1952) 253 S.W.2d 750; *Byrd* v. *American Guaranty and Liability Insurance Company,* (4th Cir., 1950) 180 F.2d 246; *Venne* v. *Standard Accident Insurance Company,* (Dist. Court of Appeal, Calif., 1959) 340 P.2d 30; *Farm Bureau Mutual Insurance Company of Indiana* v. *Emmons,* (Appellate Court of Indiana, *en banc,* 1952) 104 N.E.2d 413; *Employers Liability Assurance Corporation* v. *Sweatt et al.,* (Supreme Court of New Hamp-

shire, 1948) 95 N.H. 31, 57 A.2d 157; *Payne* v. *Dearborn National Casualty Company,* (Supreme Court of Michigan, 1950) 43 N.W.2d 316; *Bettinger* v. *Northwestern Nat. Cas. Co.,* (8th Cir. 1954) 213 F.2d 213.

In *Haynes* v. *Linder, supra,* the Missouri Court found coverage under the policy because title had *not* passed from the owner of the vehicle to the purchaser, thus following the general rule the converse of which is that coverage would not have been found if title *had* passed from the owner of the vehicle to the purchaser.

When this question was presented to the Missouri Court in *Nye* v. *James,* Mo. App., 373 S.W.2d 655, such a conclusion was reached. In that case Arnold W. Long and Nancy Long were divorced on December 3, 1958 and at the time of their divorce they were owners of an automobile, the title to which stood in the names of "Earl W. Long and/or Nancy Long, tenants by entirety." Although no endorsement of the title occurred thereafter these parties agreed among themselves that Earl would keep the car and make the payments on it, and possession of the car was delivered to Earl. Thereafter, while the automobile was being driven by one Gloria James, an accident occurred in which the plaintiff was injured and plaintiff later recovered a judgment against Gloria James and the case reported was a garnishment action against the Farmers Mutual Automobile Insurance Company which had issued a policy to "Nancy W. Long". The court held that the effect of the divorce decree was to convert the tenancy by the entirety into a tenancy in common and to vest each of the divorced spouses with an undivided one-half interest in the automobile. However, even though insured Nancy W. Long owned an undivided one-half interest in such automobile the court held, that Gloria James

was not driving with permission of Nancy W. Long, saying, l.c. 659:

> "Accordingly, since 'permission' generally 'carries with it the necessary aspect of the right, power, or privilege to give or withhold the grant of license embodied in the term' * * * we are inclined to agree with counsel for instant garnishee that, after the Ford was delivered into the sole and (as against Nancy) exclusive possession of Earl pursuant to the oral property settlement agreement, Nancy would have had no legal right or power to have granted to others 'permission' to use the Ford."

Thus it is apparent that the Missouri Courts follow the general rule in regard to permissive user and the District Court and the Circuit Court of Appeals have misinterpreted and misconstrued Missouri law in this respect. The District Court in its decision referred to *Haynes* v. *Linder* (R. 164), but did not quote the language cited above and did not refer to *Nye* v. *James* at all. In adopting the language of the District Court's decision (Appendix page A6) the Circuit Court of Appeals has also overlooked the language quoted in *Haynes* v. *Linder* and has also overlooked the case of *Nye* v. *James*.

The District Court also quoted from *Hall* v. *Weston*, 323 S.W.2d 673, l.c. 679 (Missouri 1959) (R. 164), which was adopted by the Circuit Court of Appeals in its opinion (Appendix page A7). The question involved in that case was whether the purchaser of an automobile had notified the insurer within 30 days following the delivery date of a newly acquired automobile and the Missouri Court held that there was substantial evidence to support this claim and did not rule the question of permissive user which is the crux of the instant lawsuit.

In adopting the opinion of the trial court, the Court of Appeals also based its decision on the case of *Graften*

v. *McGuire*, 362 Mo. 882, 245 S.W.2d 69, l.c. 71 (R. 165, Appendix pages A7-A8). The quoted portion merely holds that a contract or policy of insurance should be given a liberal construction.

Reference to the Graften case shows that defense was made on an exclusion clause reading, "or to the ownership, maintenance or use for pleasure purposes of any automobile not owned by or in charge of a Named Insured for use principally in such operations;" (245 S.W.2d, l.c. 71) and the Supreme Court of Missouri held that this exclusion did not apply to the car in question, quoting the language referred to in the opinion of the trial court and the Court of Appeals, because the insurance company had full knowledge of all the facts having a bearing on the risk insured *before* the policy was issued and was now estopped to deny liability (245 S.W.2d, l.c. 71).

Thus, the question of permissive user was not considered in the Graften case and that case is not authority for the decisions of the trial court and the Court of Appeals in the instant case.

Although the trial court's decision (as adopted by the Court of Appeals) holds that there are no Missouri cases setting forth the law on these facts (R. 164, Appendix page A6) and it is true that there are no Missouri cases on all fours with the facts in this case, respondent submits that the holdings in *Haynes* v. *Linder, supra*, and *Nye* v. *James, supra*, do not indicate that the Missouri courts would rule this question in this manner, but on the contrary would support the respondent's contention.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Opinion)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 17,956.

United States Fidelity and Guaranty Company, Appellant, v. Nancy Winkler, a minor by her Mother and Guardian Ad Litem Violet M. Winkler, Joyce Ann Simpson and Margaret Louise Patton Lohse, Appellees.	Appeal from the United States District Court for the Western District of Missouri.

[October 27, 1965.]

Before VAN OOSTERHOUT and MEHAFFY, Circuit Judges, and MEREDITH, District Judge.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff United States Fidelity and Guaranty Company brought this declaratory judgment action to obtain a determination that no liability exists under the family automobile policy it issued to D. H. Patton with respect to the consequences of an accident which occurred about 10:00 p. m. on October 23, 1959, when the automobile described in the policy was being operated by Margaret Patton, now Margaret Patton Lohse, divorced wife of

D. H. Patton. Nancy Winkler and Joyce Ann Simpson, who had obtained state court judgments against Mrs. Lohse for damages based on the negligent operation of the automobile on that occasion, are made defendants as is Mrs. Lohse. All defendants by answer asserted coverage existed on plaintiff's policy and asked that declaration of such coverage be made and that the state court judgments obtained against Mrs. Lohse, which were within policy limits, be enforced against the plaintiff. The defendants by counterclaim sought reformation of the policy to include Mrs. Lohse as a named insured. Jurisdiction, based upon diversity of citizenship and the jurisdictional amount, exists.

After trial to the court, memorandum opinion incorporating findings of fact and conclusions of law and a discussion of the applicable law was filed. The court determined liability existed under the policy for the consequences of the October 23, 1959, accident, and entered judgment against the plaintiff declaring policy coverage existed and enforcing the state court judgments obtained by Winkler and Simpson against Mrs. Lohse. This timely appeal followed.

Plaintiff insurer concedes that its liability policy issued to D. H. Patton covering the 1955 Buick involved in the accident here pertinent was in full force and effect on the date of the accident. The insurer's basic contention is that Mrs. Lohse is not a named insured and that she has not brought herself within the omnibus clause coverage, in that she was not a spouse or a member of the household of the named insured at the time of the accident, and further that she did not fall within the permission provision of the omnibus clause as Mr. Patton was not the owner of the car at the time of the accident and hence was in no position to give permission for its use.

It is stipulated that Mrs. Lohse obtained a divorce from D. H. Patton on the morning of October 23, 1959; that the insured Buick was awarded to Mrs. Lohse as part of an approved property settlement; that shortly after noon on October 23 the title certificate to the car was delivered to Mrs. Lohse and she obtained possession of the car about 4:00 p. m. that afternoon. The accident occurred about 10:00 p. m. the same day. The trial court found that the transfer of the title to the car under Missouri law was completed prior to the accident. While Mrs. Lohse had contended otherwise at the trial, she accepts this finding upon appeal. Thus it is established that at the time of the accident Mrs. Lohse was the sole owner of the car.

The policy bears the title "Family Automobile Policy —Liability and Physical Damage." The policy provisions under the heading "Persons Insured" with respect to liability insurance read:

"The following are Insureds under Part I:

(a) With respect to the owned automobile,

(1) the Named Insured and any resident of the same household,

(2) any other person using such automobile, provided the actual use thereof is with the permission of the *Named Insured;* (Emphasis added.)

(b) With respect to a non-owned automobile,

(1) the Named Insured,

(2) any relative, but only with respect to a private passenger automobile or trailer,
provided the actual use thereof is with the permission of the owner; . . ."

Under policy definitions, we find: "Named Insured" means the individual named in Item I of the declarations

and also includes his spouse, if a resident of the same household.

The insurer urges that Mrs. Lohse did not meet the policy requirement of being a named insured because only Mr. Patton is specifically named as an insured in the policy. It is undisputed that Mrs. Lohse was not his spouse at the moment of the accident. Mr. and Mrs. Patton were married in 1948; they separated in 1959 and were divorced on October 23, 1959. Upon the basis of such established facts, the insurer argues that at the moment of the accident Mrs. Lohse did not fall within the named insured provision of clauses (a) (1) and (b) (1) or the definition, supra, because she was not a spouse and did not live in the same household.

It is not entirely clear from the terms of the policy whether the named insured status is to be determined on the basis of facts existing at the time the insurance originates or whether the status at the time of the accident controls. It is apparent that Mrs. Lohse met the named insured definition at least until the time of the separation. Thus, taking away the coverage from her would be in the nature of a forfeiture. It is of course well-established that forfeitures are strictly construed. The policy is far from clear in containing any express statement that the status of the named insured once acquired is lost by a subsequent event such as separation. However, on the theory advanced by the trial court, which we adopt, it is not necessary to resolve the issue of whether Mrs. Lohse's status as a named insured is determined as of the time of the issuance of the policy or at a subsequent period.

The trial court made findings which are supported by substantial evidence to the effect that the insured automobile, the 1955 Buick, was purchased by Mr. and Mrs.

Patton in 1955 with joint funds with the intention of the purchasers that it be a jointly owned automobile to be used by both of them, although the title was taken in Mr. Patton alone. It is undisputed that the car was principally used by Mrs. Patton, Mr. Patton having other vehicles, and that Durkee, the insurer's authorized agent, was so fully advised when the insurance was taken out in 1955 and was further advised that both the Pattons wanted liability coverage as long as either one of them was operating the 1955 Buick. The policy renewals were upon the same basis. Mr. Durkee knew that the Pattons believed the policy would cover either of them when driving the Buick and had he thought it necessary, he would have requested an endorsement specifically designating Mrs. Patton as a named insured. It is established that the insurer, if so requested, would have provided such an endorsement without question and without extra premium and that it was the intent of Durkee as the insurer's agent as well as that of the Pattons to cover both Pattons completely so long as either of them operated or possessed the car.

Insurer's head underwriter by deposition testified as follows:

> "Q. What is the normal procedure that your agents in your company follow when a husband and wife have an automobile and they apply for insurance in your company? Is there any standard procedure as to how they are listed under a family automobile policy, whether they list just the husband or husband and wife as its named insureds? A. Normal procedure is to list only the husband.
>
> "Q. And why is that? A. The provisions of the policy provide that the named insured also includes the spouse.
>
> "Q. So really it's kind of excess baggage to put the wife's name on there as long as she's covered

anyway, is that substantially correct? A. Substantially.

"Q. Now, if a request is made to specifically list the wife as a named insured on the policy, you do issue policies that way, this type of policy, don't you? A. Yes, but only at the request of the agent or the insured.

"Q. There's no difference in premium if you put the wife on as a named insured as against leaving her off, is there? A. No, sir."

Miss Bailey, an underwriter for the insurer, testified that when the policy was first written in 1955 the company upon request would have issued the policy with both Pattons listed as named insureds without additional premium, and that then subsequent renewals would have covered both spouses as named insured and that a subsequent separation would create no change in premium. She further stated that just prior to the 1959 renewal a safe driver plan was instituted and that a 10% increase in premium might have been required because Mrs. Patton had a minor traffic violation conviction but this would not have stopped the issuance of a renewal policy to both parties, but might possibly have required a billing at a slightly higher premium.

The basis of the trial court's decision is thus stated:

"As there are no Missouri cases setting forth the law on these facts, the Court is left to its judgment as to what the Missouri Court would hold in this situation. However, the Court does note the propensity of Missouri courts to find coverage under an omnibus clause where that was the intention of the parties, *Haynes* v. *Linder*, 323 S.W.2d 505, l.c. 509 (K.C.Mo.App. 1959).

"In regard to the defendants' contention that title had not passed to Mrs. Patton, this seems to have been refuted by Mr. Patton. In his testimony he

stated that he intended to pass the Buick completely to Mrs. Patton on the afternoon of October 23, 1959, and since the title certificate had been properly endorsed and possession transferred to her, this was accomplished.

"However, Missouri law regards ownership and insurable interest to be irrelevant when the insurance policy is one for liability as opposed to coverage such as fire or theft protection. As stated in *Hall* v. *Weston*, 323 S.W.2d 673, l.c. 679 (Mo. 1959),

> '. . . wherein a policy of automobile liability insurance insures only against liability for damages by reason of bodily injury and property damage arising out of the ownership, maintenance, or *use* of the automobile, and for medical payments, and, further provides, as does the instant policy, that "insured" includes the named insured and any person using the automobile with his permission. We hold in the described situation that proof that an automobile was owned by named insured or that he had an insurable interest therein is not necessary. Ownership under those circumstances is irrelevant on the question of liability.'

"Further, the Court feels that because the plaintiff's agent Durkee was fully aware of the circumstances surrounding this policy and those insured under it, the plaintiff insured the risk of either Mr. or Mrs. Patton driving the car for so long as either party should be operating it or have it in his possession. And since the plaintiff company admits that it would have issued a binder or endorsement covering Mrs. Patton under this same policy had it only been notified, it is in no way prejudiced by the continued coverage of this same person and the same car where the title has been transferred to her name after the divorce. As stated in *Graften* v. *McGuire*, 362 Mo. 882, 245 S.W.2d 69, l.c. 71 (1952):

> '"A contract or policy of insurance should be given a liberal construction so as to uphold it and accomplish the purpose or object for which it is made, rather than a strict, technical construction which may defeat such purpose or object. (citations) The insurance company had full knowledge of all the facts having a bearing on the risk insured before the policy was issued and it is now estopped to deny liability."'
>
> "While these cases differ on their facts, the Court feels that they indicate that the Missouri Court would hold that the risk the plaintiff insured was that of both Mr. and Mrs. Patton driving the Buick, and that a change in the title certificate from Mr. Patton to Mrs. Patton should not excuse the plaintiff from a liability it intended to assume when the policy was issued."

We are satisfied that the trial court reached a permissible conclusion upon the basis of Missouri law in holding that the plaintiff by its policy provisions and actions intended that both Mr. and Mrs. Patton be named insureds. Such conclusion in and of itself requires an affirmance.

With respect to defendants' counterclaim for reformation, the court's detailed findings fully support reformation of the policy to include both Pattons as named insureds. The court having found for the defendants on other grounds, found it unnecessary to reform the insurance contract. The court on this issue states: "[T]he Court sees merit to the defendants' contention that the Pattons would be entitled to reformation to include Mrs. Patton as a named insured, since that is the way the policy should have been written initially to effect the coverage which the Pattons desired and agent Durkee thought he was providing."

Like the trial court, we feel that reformation would be justified but that it is unnecessary to reform the policy to establish Mrs. Lohse's coverage as a named insured. See *Western Cas. & Sur. Co.* v. *Herman*, 8 Cir., 318 F.2d 50, 56; 1 A.L.R. 3rd 885, 890.

Moreover, we believe the judgment entered can be supported upon the basis that Mrs. Lohse was driving the insured automobile with the permission of Mr. Patton, the named insured, under the provisions of clause (a) (2), supra. The court made a finding, which has evidentiary support, to the effect that permission to drive the insured automobile was given to Mrs. Patton by Mr. Patton, the named insured. In the *Herman* case, supra, we had occasion to interpret the permission clause in a comparable situation. There the policy was issued to Margy Herman covering liability with respect to a car the title of which was in Mark Herman, an adult son living with his mother Margy. The accident occurred while the car was driven by the owner Mark with the permission of his mother Margy, the name insured. After holding reformation of the policy would be justified, we discussed the issue here pertinent, stating:

> "However, as stated, the court did not specifically grant this relief but held that Western was liable under the 'omnibus' clause, which afforded protection to any person using the insured automobile with the permission of the named insured. At first blush it may appear anomalous to suggest that the owner of an automobile not named as an insured in a liability insurance policy may operate the automobile with 'permission' of the named insured within the meaning of the 'omnibus' clause of the policy. There is, however, a sharp conflict of authority on this question. See Appleman, Insurance Law and Practice, Vol. 7, § 4358, pp. 266-268 (1962). The Missouri courts have not to our knowledge expressly ruled

upon the precise question, but in light of the liberal construction of and the broad coverage granted under the 'omnibus' clause in two cases decided by a Court of Appeals of Missouri, *Haynes* v. *Linder* (K.C.C.A.), 323 S.W.2d 505 (1959), and *Lajoie* v. *Central West Casualty Co.*, 228 Mo.App. 701, 71 S.W.2d 803, 814 (1934), we are not prepared to say that on the peculiar facts of this case the Missouri Supreme Court would hold that the 'omnibus' clause did not provide coverage to the owner-driver of the insured vehicle." 318 F.2d 50, 56.

We also held in the *Herman* case that under Missouri law it is unnecessary for a named insured to have ownership in an automobile to have a valid automobile liability policy. For a good discussion of this issue, see *Ohio Farmers Ins. Co.* v. *Lantz*, 7 Cir., 246 F.2d 182, 186. Counsel has not cited nor have we found Missouri decisions subsequent to our opinion in *Herman* which in any way impair the basis of our holding in *Herman*.

Plaintiff has failed to establish that the trial court misinterpreted or misapplied Missouri law in reaching its decision. The fact findings upon which the decision is based are supported by substantial evidence.

The judgment appealed from is affirmed.

Judgment

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 17,956

September Term, 1965

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Appellant,

vs.

NANCY WINKLER, a Minor by Her Mother and Guardian Ad Litem VIOLET M. WINKLER, JOYCE ANN SIMPSON and MARGARET LOUISE PATTON LOHSE,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

October 27th, 1965.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Appellant,

vs.

NANCY WINKLER, a Minor by Her Mother and Guardian Ad Litem VIOLET M. WINKLER, JOYCE ANN SIMPSON and MARGARET LOUISE PATTON LOHSE,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

Petition for Re-Hearing

Comes now the United States Fidelity and Guaranty Company, Appellant above, and files this its Petition for Re-Hearing and for grounds therefor directs the attention of the Court to the following matters that were overlooked in deciding the case:

Beginning at the bottom of Page 6, the Opinion quotes the basis of the Trial Court's decision in the language of Judge Gibson's memorandum opinion and on Page 8 holds that the Trial Court reached a permissible conclusion upon the basis of Missouri law;

That both the Trial Court's findings and the Opinion are not based upon actual holdings of Missouri Courts but propensity of Missouri Courts to find coverage under an

omnibus clause and cite the cases of *Haynes* v. *Linder*, 323 S.W.2d 505 (K.C.Mo. App. 1959), and *Hall* v. *Weston*, 323 S.W.2d 673 (Mo. 1959);

That the Opinion overlooked the holdings in these cases as set out at Pages 31-32 and 37-39 of Appellant's Brief presented on this appeal;

That the Missouri Court in *Haynes* v. *Linder* found coverage because a properly endorsed certificate of title had *not* passed from the owner of the vehicle to the purchaser which was exactly opposite to the facts in the instant case and the cited case followed the general rule that *an owner of a vehicle operates the same as a consequence of his ownership and not because of permission granted him by somebody else;*

That the Court has overlooked the case of *Nye* v. *James*, 373 S.W.2d 655 (Mo. App. 1963), referred to on Pages 33 and 34 of Appellant's Brief wherein the Missouri Court held that a tenant in common would have had no legal right or power to have granted permission to a cotenant in common to use an automobile and this Court did not refer to such case in its Opinion nor draw any distinction between it and the instant case;

That the Court in holding that Mrs. Lohse was driving with permission of Mr. Patton (Opinion, Page 9), overlooked the holding of the Missouri Courts in *Haynes* v. *Linder*, and *Nye* v. *James*, *supra*, to the effect that use by the purchaser is by virtue of his ownership and does not constitute the use "by permission" of the insured seller within the meaning of the omnibus clause provision.

WHEREFORE, Appellant prays that its Petition for Re-Hearing be sustained and that it be granted a re-hearing in this case.

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Of Counsel.

CERTIFICATE OF COUNSEL

Roy F. Carter states that he is counsel for appellant in the above Petition for Re-Hearing and that such Petition is submitted in good faith and that he believes it to be meritorious.

/s/ ROY F. CARTER
ROY F. CARTER

(Order Denying Petition of Appellant for Rehearing)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 17,956

SEPTEMBER TERM, 1965

MONDAY, NOVEMBER 15, 1965.

United States Fidelity & Guaranty Company, Appellant, vs. Nancy Winkler, a minor, by her Mother Violet M. Winkler, Joyce Ann Simpson and Margaret Louise Patton Lohse.	Appeal from the United States District Court for the Western District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

November 15, 1965.

(Order Staying Issuance of Mandate Pending Certiorari Proceedings in Supreme Court, United States)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 17,956.

United States Fidelity & Guaranty Company, Appellant, vs. Nancy Winkler, a minor, by her Mother Violet M. Winkler, Joyce Ann Simpson, and Margaret Louise Patton Lohse.	Appeal from the United States District Court for the Western District of Missouri.

On Consideration of the Motion of appellant for a stay of the Mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

November 23, 1965.